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No. 97-

IN THE
Supreme Court of the United States
Term, 1997

BOBBY RIGGS, and M-HELICOPTERS OF TENNESSEE, INC.,

Petitioners

vs.

CHARLES W. BURSON, Tennessee Attorney General and Reporter, CARL JOHNSON, Commissioner of the Tennessee Department of Transportation,

Respondents

On Petition for Writ of Certiorari
To The Supreme Court of the State of Tennessee

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

BOBBY RIGGS and M-HELICOPTERS OF TENNESSEE, INC.,	) C/A NO. 03A01-90506-CV-00193
Plaintiffs-Appellants,	)
v.	) SEVIER LAW
CHARLES W. BURSON, Tennessee Attorney General and Reporter, CARL JOHNSON, Commissioner of the Tennessee Department of Transportation,	) HON. WILLIAM R. HOLT, Jr., JUDGE
Defendants-Appellees.	) VACATED AND REMANDED

OPINION

Franks, J.

This action challenged the constitutionality of Chapter 727 of the 1992 Tennessee Public Acts, now codified at Tennessee Code Annotated §§42-8-101 to -105 (1993). The Trial Court, responding to a motion to dismiss filed by the defendants, dismissed the action pursuant to Tennessee Rules of Civil Procedure, Rule 12.

Plaintiffs have appealed.

The aforementioned chapter provides that land located in a tourist county within nine miles of a national park boundary cannot be used as a heliport.[1] It also gives a private right of action for nuisance to citizens within the restricted area.

Plaintiff Riggs is the owner/operator of a heliport located within the area restricted by the statute. He has challenged Chapter 727 on the grounds that it is invalid due to federal preemption of this field, violates due process/equal protection provisions of the federal and state constitutions, and is a special law violating Art. XI, §8 of the Tennessee Constitution. He also argues Tennessee Code Annotated §13-7-208 allows him to continue his non-conforming operation.

In dismissing the action, the Trial Court said the Chapter is a land use statute and is therefore not preempted by federal law, and that it does not violate due process or equal protection because it is a rationally based and facially constitutional exercise of land use authority by the General Assembly, and T.C.A. §13-7-208(b) does not apply to Chapter 727 because it applies to municipal zoning only. Even if §13-7-208 did apply to a state law, the Trial Court found that Chapter 727 would act to repeal or amend by implication any conflicting provisions and would not allow plaintiff's use to continue.

In considering a motion to dismiss, all of the facts alleged in the complaint are taken as true. *Cornpropst v.*

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[1] Note that §42-1-301 to 303 (1993) also deals with heliports. It provides that "No person shall engage in commercial heliport touring in any tourist resort county . . . except at a primary public airport."

Sloan, 528 S.W.2d 188 (Tenn. 1975). The Court then determines whether those facts state a cause of action that should be decided by a trier of fact. *Gray v. McDonald's Corp.*, 874 S.W.2d 44 (Tenn. App. 1993).

Plaintiff argues the Trial Court improperly construed the pleadings in favor of the defendants when it determined that the statute had a rational basis. It is argued the Court should have accepted the plaintiff's contention that the law did not have a rational basis.

If the elements of an action are present, the claim should be remanded for a trial on the merits. If the elements are not present, the granting of the motion to dismiss must be sustained.

The supremacy clause gives Congress the power to preempt state law. U.S. Constitution Article VI. Preemption is found in the following circumstances:

> Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is outright or actual conflict between state and federal law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

Watson v. Cleveland Chair Co., 789 S.W.2d 538 (Tenn. 1989) (cites omitted).

In this case, plaintiffs contend Chapter 727 is directed at noise, an area which the federal government has impliedly preempted through the Federal Aviation Act and the Noise Control Act. *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 93 S.Ct. 1845, 36 L.Ed.2d 547 (1973). Plaintiff further argues a distinction can be drawn between preempted statutes directed at noise and land use statutes directed at the siting of airports.

If it should be determined that Chapter 727 is directed at noise, the statute would be preempted under *City of Burbank*. Since the elements of a preemption claim were alleged, the granting of the motion to dismiss was error.

Due process and equal protection requires that all persons and entities shall be treated the same under like circumstances and conditions, both as to privileges conferred and liabilities incurred. *Genesco, Inc. v. Woods*, 578 S.W.2d 639 (Tenn. 1979). Unless a classification impermissibly interferes with the exercise of a fundamental right or operates to the particular disadvantage of a suspect class the classification is subject to the rational basis test. *Harrison v. Schrader*, 569 S.W.2d 822 (Tenn. 1978).

Here, the classification has been created among heliports located near the Smoky Mountains. A rational basis test should be used because no fundamental right or suspect class is implicated. The rational basis test upholds the classification made by a statute if there is any possible reason or justification for its passage. *Kelley v. 3-M Co.*, 639 S.W.2d 437 (Tenn. 1982). The appropriate inquiry is whether the classification has a reasonable relationship to a legitimate state interest. *State v. Tester*, 879 S.W.2d 823 (Tenn. 1994). The burden of showing that a classification is unreasonable and arbitrary is placed upon the individual challenging the statute. *Harrison*.

The plaintiff argues there is no rational basis for this

distinction among heliports. He also argues that noise control can not provide a basis for this distinction, because it is precluded by the federal preemption field. If he can demonstrate this is true, he may prevail, and granting the motion to dismiss was in error.

Tennessee Constitution, Article XI, §8 provides that:

> General laws only to be passed. - The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunitie[s], or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of each law . . . .

In order to trigger analysis under this provision, a statute must "contravene some general law which has mandatory statewide application." *Civil Service Merit Board v. Burson*, 816 S.W.2d 725 (Tenn. 1991); *Knox County ex rel. Kessel v. Lenoir City*, 837 S.W.2d 382 (Tenn. 1992).

Plaintiff's complaint does not specifically state a general law which has been suspended by Chapter 727. He simply argues that the general law would apply to all heliport operators in Sevier, Blount, and Cocke Counties, but for the imposition of the nine mile zone.

A general law which would apply in the absence of Chapter 727 is T.C.A. §42-2-211, which governs the licensing of airports. Chapter 727 contravenes its provisions when it provides that "the department of transportation shall

not issue or renew licenses pursuant to chapter 2 of this title for any heliport located on land subject to the prohibition . . . except that licenses may be renewed for helicopters [during the amortization period]. T.C.A. §42-8-201(b).[2]

If Chapter 727 suspends the general licensing law, such suspension would not violate Art. XI, §8, unless it creates classifications which are capricious, unreasonable, or arbitrary. *Burson*. Where the reasonableness of the classification is fairly debatable the courts will uphold the classification. *Stalcup v. City of Gatlinburg*, 577 S.W.2d 439 (Tenn. 1978). If any possible reason can be conceived to justify the classification, it will be upheld and deemed reasonable. *Id.*

Here, a distinction has been drawn between the licensing of a heliport operator within the nine mile range and outside the range. Plaintiff's complaint alleges that no reasonable basis exists for this distinction. This issue is

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[2] Approval of airport licenses takes place if the Department of Transportation is satisfied that "(A) The site is adequate for the proposed airport; (B) Such proposed airport, if constructed or established, will conform to minimum standards of safety; and (C) Safe air traffic patterns could be worked out for such proposed airport and for all existing airports and approved airport sites in its vicinity." Renewal is allowed unless the department "reasonably determines that (1) There has been an abandonment of the airport as such; (2) There has been a failure to comply with the conditions of the license of renewal thereof; or (3) Because of a change of physical or legal conditions or circumstances the airport has become either unsafe or unusable for the aeronautical purposes for which the license or renewal was issued." Tenn. Code Ann. §42-2-211.

likewise inappropriate for summary judgment.

Finally, T.C.A. §13-7-208 protects some nonconforming uses from changes in zoning provisions. It reads:

> In the event that a zoning change occurs in any land area where such land area was not previously covered by any zoning restrictions of any governmental agency of this state or its political subdivisions, and such zoning restrictions differ from zoning restrictions imposed after the zoning change, then any industrial, commercial or business establishment in operation, permitted to operate under zoning regulations or exceptions thereto prior to the zoning change shall be allowed to continue in operation and be permitted; provided, that no change in the use of the land is undertaken by such industry or business.

T.C.A. §13-7-208(b) (1995).

Plaintiff argues that he is entitled to continue his operation under this provision. However, there are at least two reasons why the provisions of T.C.A. §13-7-208(b) do not apply in this case. First, §13-7-208 applies only to municipal zoning ordinances. *Fields v. White*, 1989 WL 5456 (Tenn. App. 1989); *also see State ex rel. Browning-Ferris Industries of Tenn. v. Bd. of Commissioners of Knox County*, 806 S.W.2d 181, 189 (Tenn. App. 1990). Although plaintiff cites *Sanders v. Angie Properties, Inc.*, 834 S.W.2d 332 (Tenn. App. 1992) for the proposition that the statute applies to county ordinances and therefore could also apply to state ordinances, *Sanders* only made a reference to "*See*

Tenn. Code Ann. §13-7-208(b)" in its discussion of non-conforming uses. The *Sanders* Court did not interpret or apply the statute. *Id.*

The other reason that §13-7-208 does not apply is established by the language of Chapter 727:

> Violations - Heliport deemed nuisance - Abatement, removal, conformity - Notwithstanding the provisions of §13-7-208 or any other law to the contrary, a heliport operating as of April 23, 1992, that is in violation of §42-8-102(a) is declared a public nuisance and shall be abated, removed or changed to conform with this chapter by July 1, 1994. Such heliports may continue to operate until that date provided: (1) The heliport is not extended or expanded; and (2) If the use of the land or any portion thereof as a heliport is discontinued for a period of six (6) months or changed, any future use of the land is in conformity with this chapter.

Tenn. Code Ann. §42-8-103 (emphasis supplied).

This provision demonstrates that the General Assembly considered §13-7-208 and specifically rejected its application to these circumstances.

A claim under T.C.A. §13-7-208 requires a municipal zoning ordinance. No such ordinance is alleged in plaintiff's complaint. The motion was properly granted as to this ground.

The allegations of the complaint set forth the elements for claims of preemption, due process and equal protection, and an unconstitutional suspension of general law. Our decision is not to be construed to say the statutes are free or

not free of constitutional defects. We are remanding the case for the parties to be afforded the opportunity to introduce any evidence which is material and pertinent in considering the validity of the statute. *Lawrence v. Stanford*, 655 S.W.2d 927 (Tenn. 1983).

The costs of the appeal are assessed to the defendants, and the cause remanded for further proceedings consistent with this opinion.

Herschel P. Franks, J.

CONCUR:
Don T. McMurray, J.
Charles D. Susano, Jr., J.

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

NOT FOR PUBLICATION

BOBBY RIGGS and M-HELICOPTERS OF TENNESSEE, INC.,	)	Filed:
	)	April 7, 1997
Plaintiffs-Appellees,	)	
	)	Sevier County
Vs.	)	
	)	No. 03-S-01
CHARLES W. BURSON, Tennessee Attorney General and Reporter, CARL JOHNSON, Commissioner of the Tennessee Department of Transportation,	)	-9603 -CV
	)	-00032
	)	
	)	
	)	
Defendants-Appellants.	)	

ORDER DENYING PETITION TO REHEAR

The plaintiffs have filed a petition to rehear this case pursuant to Tenn. R. App. P. 39, contending that our opinion conflicts with existing authority, overlooks or misapprehends a proposition of law, and relies on material facts which are in dispute.

After due consideration, we conclude that the petition to rehear should be denied.

PER CURIAM